

Gopstein v Vad

2023 NY Slip Op 31036(U)

March 30, 2023

Supreme Court, New York County

Docket Number: Index No. 805001/2019

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. JOHN J. KELLEY</u></p> <p style="text-align: right;"><i>Justice</i></p> <p>-----X</p> <p>SHELDON GOPSTEIN</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>VIJAY B. VAD, M.D.,</p> <p style="text-align: right;">Defendant.</p> <p>-----X</p>	<p>PART 56M</p> <p>INDEX NO. <u>805001/2019</u></p> <p>MOTION DATE <u>01/05/2023</u></p> <p>MOTION SEQ. NO. <u>002</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

In this action to recover damages for medical malpractice, the defendant moves pursuant to CPLR 3103 for a protective order quashing an October 18, 2022 subpoena duces tecum that the plaintiff served upon nonparty Hospital For Special Surgery (HSS). The plaintiff opposes the motion. The motion is granted to the extent that the items denominated as demand numbers six and seven in the subpoena are quashed, and a protective order is granted excusing HSS from responding to those demands for documents. The motion is otherwise denied, and HSS shall fully respond to the demands for other items denominated in the subpoena on or before May 5, 2023.

On October 18, 2022, the plaintiff, who is himself an attorney, drafted and prepared a subpoena duces tecum that was addressed to HSS, the hospital where the defendant physiatrist/physical medicine specialist performed the medical procedure that is the subject of this action. The plaintiff served the subpoena upon HSS shortly thereafter. The subpoena enumerated nine categories of documents that the plaintiff demanded HSS to produce. Demand numbers one, two, three, four, and five all sought documents, including medical records, charts, and written communications in HSS's possession, that related or referred either

to the subject procedure or the plaintiff himself. Demand number six requested documents concerning prior complaints about the defendant. Demand number seven requested document related to quality assurance reviews of the defendant. Demand numbers eight and nine requested documents containing contact information for any persons who were involved in the subject procedure or who were in the room when the procedure was performed.

Public Health Law § 2805-j(1) provides, in pertinent part, that “[e]very hospital shall maintain a coordinated program for the identification and prevention of medical . . . malpractice.” Such a program must include at least, among other things, the “establishment of a quality assurance committee with the responsibility to review the services rendered in the hospital in order to improve the quality of medical . . . care of patients and to prevent medical . . . malpractice” (Public Health Law § 2805-j[1][a]). Education Law § 6527(3) exempts certain records from CPLR article 31 disclosure, and provides that

“[n]either the proceedings nor the records relating to performance of a medical or Quality Assurance review function or participation in a medical and dental malpractice prevention program nor any report required by the department of health pursuant to section twenty-eight hundred five-*l* of the public health law described herein, including the investigation of an incident reported pursuant to section 29.29 of the mental hygiene law, shall be subject to disclosure under article thirty-one of the civil practice law and rules.”

That statute also shields from disclosure the testimony of any person in attendance at such a meeting as to what transpired when a medical or quality assurance review function or medical malpractice prevention program was performed (see *Logue v Velez*, 92 NY2d 13, 16-17 [1998]; *Hernandez v City of New York*, 207 AD3d 450, 453 [2d Dept 2022]; *Siegel v Snyder*, 202 AD3d 125, 136-137 [2d Dept 2021]).

“The purpose of the discovery exclusion is to enhance the objectivity of the review process and to assure that medical review committees may frankly and objectively analyze the quality of health services rendered by hospitals. By guaranteeing confidentiality to quality review and malpractice prevention procedures, this provision is designed to encourage thorough and candid peer review of physicians, and thereby improve the quality of medical care”

(*Logue v Velez*, 92 NY2d at 17 [citation and internal quotation marks omitted]; see *Hernandez v City of New York*, 207 AD3d at 453; *vanBergen v Long Beach Med. Ctr.*, 277 AD2d 374, 374 [2d Dept 2000]). Public Health Law § 2805-m(2) affords similar protection from disclosure for “records, documentation or committee actions or records” generated pursuant to Public Health Law § 2805-j (see *Siegel v Snyder*, 202 AD3d at 137).

The Court of Appeals recognized a statutory exception to confidentiality, as otherwise required in both Education Law § 6527(3) and Public Health Law § 2805-m(2), for “statements made by any person in attendance at such a meeting *who is a party to an action or proceeding* the subject matter of which was reviewed at such meeting” (emphasis added). The Court concluded that these exceptions necessarily “permit discovery of statements given by a physician or other health professional in the course of a hospital’s review of the facts and circumstances of *an earlier incident which had given rise to a malpractice action*” (*Logue v Velez*, 92 NY2d at 19) (emphasis added). That exception, however, is not the subject of the plaintiff’s subpoena. Rather, he is seeking “[a]ll complaints of any kind by present or former patients of Dr. Vijay Vad in the past ten years” and “[a]ll internal and outside evaluations and reviews concerning Dr. Vijay Vad in the past ten years.” Those documents are explicitly exempt from disclosure by the Education Law and the Public Health Law. Hence, the subpoena must be quashed to the extent that they seek production of documents responsive to those demands.

While the court recognizes that “a subpoena duces tecum may not be used for the purpose of discovery or to ascertain the existence of evidence” (*Matter of Terry D.*, 81 NY2d 1042, 1044 [1993]; see *Law Firm of Ravi Batra, P.C. v Rabinowich*, 77 AD3d 532, 533 [1st Dept 2010]), and that “its purpose is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding” (*Matter of Terry D.*, 81 NY2d at 1044, quoting *Matter of Constantine v Leto*, 157 AD2d 376, 378 [3d Dept 1990], *affd* 77 NY2d 975 [1991]), the other materials sought by the plaintiff here are clearly documents that exist, are in HSS’s possession, and are relevant to facts at issue. There is no doubt that HSS generated

medical records and a chart referable both to the plaintiff and the subject procedure that was performed by the defendant, that it generated written communications concerning both the plaintiff and the subject procedure, that records exist indicating who was in the room during the procedure and who assisted in the procedure, and that records exist setting forth the last known residence and business addresses of those individuals. The plaintiff appropriately has limited the documents that he demanded to the subject procedure and his admission to and treatment by HSS in connection with the procedure. The subpoena thus was properly limited both as to time, scope, and relevant occurrences (*cf. Humphrey v Kulbaski*, 78 AD3d 786, 787-788 [2d Dept 2010] [nonparty subpoena duces tecum seeking medical records was too broad and not sufficiently limited as to time of treatment]).

Accordingly, it is

ORDERED that the motion is granted to the extent that so much of the October 18, 2022 subpoena duces tecum as demanded that nonparty Hospital For Special Surgery produce documents containing, referring to, or relating to all complaints of any kind by present or former patients of Dr. Vijay Vad in the past ten years and all internal and outside evaluations and reviews concerning Dr. Vijay Vad in the past ten years, as set forth in demand numbers six and seven of the subpoena, be, and hereby is, quashed, nonparty Hospital For Special Surgery is relieved from any obligation to produce those documents, and the motion is otherwise denied; and it is further,

ORDERED that, on or before May 5, 2023, nonparty Hospital For Special Surgery shall produce and provide to all parties copies of documents responsive to demand numbers one, two, three, four, five, eight, and nine in the October 18, 2022 subpoena duces tecum; and it is further,

ORDERED that, on or before April 5, 2023, the plaintiff shall serve a copy of this order with notice of entry, by regular first-class mail, upon the legal department of nonparty Hospital For Special Surgery.

This constitutes the Decision and Order of the court.

3/30/2023

DATE


JOHN J. KEENEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: